



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 1, 2015

Robert Boco
Sr. Assistant City Attorney
456 W. Olive Avenue
Sunnyvale, CA 94088

Re: Your Request for Advice
Our File No. A-15-078

Dear Mr. Boco:

This letter responds to your requests for advice on behalf of Sunnyvale City Council Member Gustav Larsson, Planning Commissioners Sue Harrison, Larry Klein and Ken Rheaume, and Economic Development Manager Connie Verceles, regarding their duties under the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

May Councilmember Larsson, and Planning Commissioners Harrison, Klein, Rheaume, and Economic Development Manager Verceles make, participate in making, or influence decisions related to the comprehensive update of the El Camino Real Precise Plan (the “Update”) despite owning property near El Camino Real?

CONCLUSION

Councilmember Larsson, and Planning Commissioners Harrison, Klein, Rheaume, and Economic Development Manager Verceles may make, participate in making, or influence decisions related to the Update since at this time it is not foreseeable that the Update will materially financially affect the officials’ property.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

El Camino Real is an east-west thoroughfare that traverses the entire width of the City; it is a primary commercial corridor. Sunnyvale adopted a Precise Plan for El Camino Real in 1973 that was updated in 2007. The Precise Plan encompasses the entire length of El Camino Real as it crosses the City, and includes the adjoining parcels on either side of the street. The Precise Plan area encompasses 324 acres; the developable land in the entire City encompasses 9,895 acres.

The purpose of the Precise Plan is to maintain and increase the vibrancy and vitality of El Camino Real as it extends through Sunnyvale. It serves as a guide to encourage well-designed, appropriate developments, and offers strategies to capitalize on the strengths of El Camino Real and to overcome the limitations in order to enhance the ability of the corridor to remain a vibrant and successful part of the City. The goal of the original Precise Plan is to: (1) establish a common vision for El Camino Real; (2) provide design guidelines for use by property owners, developers and the City in considering the redevelopment or rehabilitation of properties along El Camino Real; (3) highlight development opportunities in certain locations known as “Nodes”, where more intense mixed-use development will be encouraged; (4) emphasize the importance of enhancing the street character of El Camino Real by developing a unifying design to provide a distinct aesthetic standard for the corridor.

The City of Sunnyvale is undertaking a comprehensive update of the Precise Plan, which among other things, will: (1) review and determine the appropriate proportion of commercial and residential uses for mixed-use sites; (2) determine what level of mixed-use development can occur in node and non-node locations, including densities, heights and other development standards; (3) review the appropriate mix of commercial and residential uses; and review sidewalk and design standards for various types of projects. The Update will include the development of urban design standards and guidelines, infrastructure development, and environmental review through an Environmental Impact Report (the “EIR”). Staff will participate in preparing the Update, and the City’s Planning Commission and City Council will take action to review the Update along the way, certify the EIR, and ultimately adopt the Update. The Metropolitan Transportation Commission is funding the cost of the Precise Plan in part through a grant because El Camino Real runs through the heart of an area the city designated as a Priority Development Area (“PDA”).²

The following public officials’ residences are within 500 feet of the Precise Plan boundaries:

- Economic Development Manager Connie Verceles owns a home that is 364 feet from the Precise Plan area boundary.

² PDAs are generally areas of at least 100 acres where there is local commitment to developing more housing along with amenities and services to meet the day-to-day needs of residents in a pedestrian-friendly environment served by transit. To be eligible to become a PDA, an area had to be within an existing community, near existing or planned fixed transit or served by comparable bus service, and planned for more housing. Designation as a PDA allows a community to apply for grants from the Metropolitan Transportation Commission for certain activities. The boundaries of the PDA are broader than the boundaries of the Precise Plan. The action to update the Precise Plan will not require any change to the PDA

- Planning Commissioner Larry Klein owns a home that is 55 feet from the Precise Plan Area Boundary.
- Planning Commissioner Sue Harrison owns a home that is 271 feet from the Precise Plan Area boundary.

You stated that there are several intervening streets from the Precise Plan area to the respective properties of the public officials to shield them from many foreseeable measurable impacts.

The following officials' residences are beyond 500 feet of the Precise Plan boundaries:

- Planning Commissioner Ken Rheaume owns a home that is 775 feet from the Precise Plan Area Boundary.
- City Councilmember Gustav Larsson owns a home that is 786 feet from the Precise Plan Area Boundary.

You stated that these members are in established neighborhoods some distance from the boundary of a portion of the Precise Plan area, which runs through the entire City, and which has been in place for many years. You also stated that under these circumstances, it is not likely the decision will influence the market value of the officials' homes.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest.³ Under Section 87103, a public official has a financial interest in real property in which he or she has a direct or indirect interest of \$2,000 or more.⁴ (Section 87103(b).) Under your facts, each of the officials in question has an interest in real property that may be affected by the precise plan amendment.

³ Please note that a public official who has a conflict of interest in a decision noticed at a public meeting, must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

⁴ Section 87103 also recognizes as potentially disqualifying interests: (1) a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)); (2) any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision (Section 87103(c)); (3) any source of gifts to him or her if the gifts aggregate to \$440 or more within 12 months prior to the decision (Section 87103(e)); and (4) the official's personal finances, including those of the official's immediate family (Section 87103). We limit our analysis to the real property described in your letter.

Foreseeability and Materiality: Regulation 18701(b) provides that if a financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. In determining whether a governmental decision will have a reasonably foreseeable the following factors should be considered.

“(1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

“(2) Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

“(3) Whether the public official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has a financial interest.

“(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interest might compromise a public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

“(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision.

“(6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position.”

In order to determine whether the Update will have a material financial effect on the official's property, we apply the guidelines set forth in Regulation 18702.2 which provides, in pertinent part that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, is material whenever the governmental decision:

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official’s real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

“(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official’s real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18702.1. Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official’s property; or

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.”

Your facts implicate each of these subdivisions. These three subdivisions all focus on the effects on the officials’ interest emanating from the project site. We note that the Precise Plan currently exists and the decision is not to create the Precise Plan area or change the boundaries. Rather the decisions are more localized, including review and determination of the appropriate proportion of commercial and residential uses for mixed-use sites, the levels of mixed-use development that can occur in node and non-node locations, as well as densities, heights and other development standards, review the appropriate mix of uses, commercial and residential, and review sidewalk and design standards for various types of projects.

Councilmember Larsson and Planning Commissioner Rheume

As noted above, you stated that there are several intervening streets from the Plan area to the respective properties of the public officials to effectively shield them from many foreseeable measurable impacts. There are no facts to suggest that the Update will substantially alter traffic levels or intensity of use, including parking, of property surrounding the officials’ real property.

You also stated, specifically about Councilmember Larsson and Commissioner Rheume who both own property beyond 700 feet from the Plan boundaries that these members are in established neighborhoods some distance from the boundary of a portion of the Plan area, which has been in place for many years. In addition, they are separated from the Plan area by developed city blocks housing numerous businesses and homes. We agree that is not foreseeable that the Update to the Plan will affect the market value of the officials’ homes in any measurable way.

Economic Development Manager Verceles, Planning Commissioners Klein and Harrison.

Some of the same general facts applicable to Councilmember Larsson and Planning Commissioner Rheume apply to the officials within 500 feet of the boundaries of the Plan. You stated that there are intervening streets, homes, and commercial properties between the officials' properties and El Camino Real.

In addition, the general nature of the decisions suggests that none will result in a measurable financial effect on the property. Thus, material financial effects are not foreseeable at this time.

However, if the consideration of the Update progresses to a point where more concrete applications or projects are considered near the officials' respective properties, you should contact us for further advice.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl